U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 August 2006

Case No. 2005-BLA-5626

In the Matter of:
E.R.[1]
Claimant,

v.

PIKE COUNTY COAL CORPORATION
Employer,
and
ACORDIA EMPLOYERS SERVICE
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Joseph E. Wolfe, Esq.
On behalf of Claimant

Carl Brashear, Esq.
On behalf of Employer

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

DECISION AND ORDER – AWARD OF BENEFITS

[1] The Department of Labor has directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site starting prospectively on August 1, 2006, and to insert initials of such claimant/parties in the place of those proper names. This order only applies to cases arising under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act, and FECA. In support of this policy change, DOL has directed submission of a proposed rule change to 20 C.F.R. § 725.477, proposing the omission of the requirement that decisions and orders of Administrative Law Judges contain the claimant/parties' initials only, to avoid unwanted publicity of those claimants on the web, and has installed software that prevents entry of the full names of claimant parties on final decisions and related orders. I strongly object to that policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank,* 951 F. 2d 320 (11th Cir. 1992) and

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[2]

On March 2, 2005, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 32).[3] A formal hearing on this matter was conducted on February 22, 2006 in Pikeville, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross-examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in this case are:

1. Whether the claim was timely filed;

2. Whether the Claimant was a miner;

3. Whether the Claimant worked at least 35 years in or around coal mines;

4. Whether the Claimant has established the existence of pneumoconiosis;

3. Whether the Claimant's pneumoconiosis arose out of coal mine employment;

4. Whether the Claimant is totally disabled;

5. Whether the Claimant's disability is due to pneumoconiosis;

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those collected at 27 Fed. Proc., L. Ed. § 62:102 (Thomson/West July 2005). Furthermore, I strongly object to the specific direction by the DOL that Administrative Law Judges have a "mind-set" to use the complainant/ parties' initials if the document will appear on the DOL's website, for the reason, *inter alia,* that this is not a mere procedural change, but is a "substantive" procedural change, reflecting decades of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge's decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial "mind-set" constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. § 725.455(b), not merely that presently contained in 20 C.F.R. § 725.477 to state such party names.

[2] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] In this Decision, "DX" refers to the Director's Exhibits, "CX" refers to the Claimant's Exhibits, "EX" refers to the Employer's Exhibits, and "Tr." refers to the official transcript of this proceeding.

6. Whether the Claimant has two dependents for purpose of augmentation;

7. Whether Pike County Coal Corporation is the responsible operator;

8. Whether the employer has secured the payment of benefits; and

9. Whether the Claimant has demonstrated that one of the applicable conditions of entitlement has changed since the date of the last denial pursuant to § 725.309(d).

(DX 32; Tr. 6).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

E.R. ("Claimant") was born on May 17, 1945 and was 60 years old at the time of the hearing. (DX 3). He completed the eighth grade. He married his wife on January 10, 1987, and they remain married and living together. (DX 3, 10; Tr. 14-15). They have a son, born November 21, 1988, making him 17 years old at the time of the hearing. (DX 3, 11; Tr. 15). Their son is a student. (Tr. 15). I find that Claimant has two dependents for purposes of augmentation.

Claimant testified that he last worked in the coal mines in April 2001. (Tr. 10). He quit just before the coal mine closed when he was beginning to feel sick. (Tr. 16-17). He could not return to mining now because he is so short of breath. (Tr. 11).

Claimant's family physician is Dr. Manning but he has not seen him long because the physician took over Dr. Valera's practice. (Tr. 18-19). He treats Claimant for his breathing problems, prescribing Singulair. Claimant also suffers from arthritis and bad nerves. (Tr. 23, 24). He sometimes has chest pain. (Tr. 24). He testified that he has never smoked. (Tr. 25).

Procedural History

Claimant filed his initial claim for benefits under the Act on May 29, 2001, and that claim was denied by the District Director in a proposed decision and order dated December 27, 2002. (DX 1). The District Director credited the Claimant with 22 1/3 years of coal mine employment and found that Claimant established the existence of pneumoconiosis arising out of coal mine employment but not a totally disabling pulmonary impairment. Thus, the claim was denied. Claimant took no further action so the action was considered administratively closed and deemed abandoned pursuant to a March 18, 2003 letter issued by a Department of Labor claims examiner.

On March 23, 2004, Claimant filed a subsequent claim for benefits under the Act. (DX 3). The Director, Office of Worker's Compensation Programs ("OWCP"), issued a proposed decision and order award of benefits on November 15, 2004. (DX 25). The Employer timely requested a formal hearing before the Office of Administrative Law Judges. (DX 26).

Length of Coal Mine Employment and Responsible Operator

The determination of length of coal mine employment must begin with § 725.101(a)(32)(ii), which directs an adjudication officer to ascertain the beginning and ending dates of coal mine employment by using any credible evidence. There are several permissible sources of credible evidence. First, an administrative law judge may rely solely upon a coal mine employment history form completed by the miner. *See Harkey v. Alabama-By-Products Corp.*, 7 B.L.R. 1-26 (1984). A miner's uncontradicted and credible testimony may also be the exclusive basis for a finding on the length of miner's coal mine employment. *See Bizarri v. Consolidation Coal Co.*, 7 B.L.R. 1-343 (1984); *Coval v. Pike Coal Co.*, 7 B.L.R. 1-272 (1984). If the miner's testimony is unreliable, it is permissible for an administrative law judge to credit Social Security records over the miner's testimony. *See Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984).

In this case, the Employer contests Claimant's allegation of 35 years of coal mine employment. Claimant testified that he was first self-employed as a coal hauler for ten years beginning in 1963. (Tr. 20, 21, 22). He loaded coal onto his truck and hauled it from the mine tipple to the coal ramp at the railroad station. (Tr. 21). He then began work for Smallwood Coal Company as a driller and coal shooter. (Tr. 12). His last coal mining job both at Northstar and Pike County Coal was as a mechanic and shuttle car operator. (Tr. 13, 23). The shuttle car delivers the coal from the miner to the belt. He stated that he last worked for Northstar, which took over a Pike County Coal mine. This work lasted three or four months. (Tr. 11). Prior to Northstar, Claimant worked for Pike County Coal Corporation as an underground miner from 1990 to early 2001. (Tr. 23).

The Employment History form accounts for coal mine employment from 1963 to April 2001. (DX 4). Besides self-employment as a coal truck driver from 1963 to 1964 and again from 1968 to 1973, Claimant listed the following employers and years of employment, all of which was underground:

Smallwood Coal Company	1974-80
Bent Mountain Coal Co., Inc.	1981-84
Bent Mountain (different location)	1984-85
Bent Mountain (different location)	1986-87
Ernest Turner Trucking	1987
Biggs Branch Coal Co.	1987-88
Faith Coal Sales, Inc.	1988-90
Shipyard River Coal Terminal	10/1990-5/2000
Northstar Coal Co.	1/2001-4/2001

The miner's W-2 forms cover employment from 1976 through 2000. (DX 6). Claimant worked for the following companies for the years indicated:

Smallwood Coal Company	1976 through 1979
Bent Mountain Coal Co., Inc.	1981 through 1987
Ernest Turner Trucking	1987
Biggs Branch Coal	1987 through 1988
Faith Coal Sales, Inc.	1988 through 1990
Shipyard River Coal Terminal Co.	1991 through 2000

(DX 6).

The Social Security Earnings statement confirms the following employment:

Smallwood Coal Company	17 quarters in 1974, 1976-80
Big Branch Fuel Inc.	1 quarter in 1981
Bent Mountain Coal Co. Inc.	28 quarters from 1982-87
RDA Trucking Co.	1 quarter in 1986
Ernest Turner	4 quarters in 1987
Biggs Branch Coal Co., Inc.	4 quarters in 1988
Faith Coal Sales Inc.	12 quarters from 1988-90
Shipyard River Coal Terminal Co.	40 quarters from 1991-2000
Excel Mining LLC	1 quarter in 2000

(DX 8). The Social Security records also show that Claimant was self-employed for at least part of the time in 1963, 1964, and 1968-75. Further employment records reveal that Claimant worked for North Star Mining Inc. in 2001, and earned $11,053.25 that year. (DX 9).

Based on this data, I find the Social Security records and W-2 forms to be the most credible. To the extent the Claimant's testimony and employment history form confirm the Social Security and tax records, I also find them credible. The Social Security records substantiate 27 years of coal mine employment, excluding self-employment. The W-2 forms confirm 23 years of coal mine employment. The Employment History form correlates with the W-2 and Social Security records insofar as the miner's employment with Ernest Turner Trucking, Biggs Branch Coal Co., and Faith Coal Sales, Inc. are concerned. It further shows three months of employment in 2001 with North Star Coal, as testified to by Claimant. Consequently, I credit the miner with 27 1/4 years of coal mine employment, excluding his self-employment.

Although Claimant testified that he worked as a self-employed coal hauler for ten years from 1963 to 1973, the Social Security records confirm only a portion of that employment. They show self-employment in 1963, 1964, and 1968-1975. I credit Claimant with one-half year of employment for each of those years. Thus, he has established an additional 4 ½ years. Accordingly, I find that Claimant has established 31 3/4 years of coal mine employment and that his last job of at least one year was as a mechanic and shuttle car operator. I further find that Claimant's last coal mine employment of at least one year was with Shipyard River Coal, under

the assumed name of Pike County Coal Corporation, and that the Employer secured the payment of benefits as shown by the Department of Labor search. (DX 15, 16).

Claimant's last employment was in the state of Kentucky; therefore, the law of the Sixth Circuit is controlling.

Timeliness

Under 20 CFR § 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. 20 CFR § 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. This statute of limitations does not begin to run until a miner is actually diagnosed by a doctor, regardless of whether the miner believes he has the disease earlier. *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602 (6th Cir. 2001).

In an unpublished opinion arising in the Sixth Circuit, *Furgerson v. Jericol Mining, Inc.*, BRB Nos. 03-0798 BLA and 03-0798 BLA-A (Sept. 20, 2004) (unpub.), the Benefits Review Board held that *Kirk*, 264 F.3d 602 is controlling and directed the administrative law judge in that case to "determine if [the physician] rendered a well-reasoned diagnosis of total disability due to pneumoconiosis such that his report constitutes a 'medical determination of total disability due to pneumoconiosis which has been communicated to the miner'" under § 725.308 of the regulations.

The Sixth Circuit held in *Kirk*, 264 F.3d 602 that:

> The three-year limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of a miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination, like Kirk's 1979, 1985, and 1988 claims, and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. [Footnote omitted.] Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

The Employer failed to set forth its argument as to why Claimant's claim is untimely. The issue was not addressed in the post-hearing brief. In the instant case, Claimant testified that he seldom goes to doctors and that no physician has ever told him that he is totally disabled due to pneumoconiosis. (Tr. 18, 20). Furthermore, in connection with the original claim, no physician opined that Claimant was totally disabled due to pneumoconiosis. Based on this fact and the miner's uncontroverted evidence, I find that Claimant's claim is timely pursuant to the presumption found at § 725.308(c).

MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant selected John Randolph Forehand, M.D. to provide his Department of Labor sponsored complete pulmonary examination. (DX 12). Dr. Forehand conducted the examination on June 7, 2004. (DX 13). I admit Dr. Forehand's report under § 725.406(b). I also admit Dr. Barrett's quality-only interpretation of the June 7, 2004 chest x-ray under § 725.406(c). (DX 14).

Claimant did not complete a Black Lung Benefits Act Evidence Summary Form. Claimant's attorney confirmed at the hearing that Claimant's "medical evidence and exhibits that [had] been submitted with the Director's evidence [were] sufficient." (Tr. 6).

Employer completed a Black Lung Benefits Act Evidence Summary Form. (EX 3). Employer designated Dr. Dahhan's complete pulmonary examination conducted on September 17, 2001 and Dr. Broudy's review of medical evidence conducted on July 19, 2004. (DX 20, DX 1). Employer also designated Dr. Dahhan's interpretation of the September 15, 2001 x-ray and Dr. Kendall's interpretation of the June 7, 2004 x-ray as initial evidence, as well as Dr. West's interpretation of the June 7, 2004 x-ray as rebuttal evidence of the Director's x-ray. (DX 1, 24; EX 1). Employer further designated Dr. Dahhan's September 15, 2001 PFT and ABG as affirmative evidence. (DX 1). Finally, Employer has designated, as other evidence under § 718.107, the deposition of Dr. Forehand taken on August 30, 2004. (EX 2). Employer's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414 (a)(3). Therefore, I admit the evidence Employer designated in its summary form. Because I find, for the reasons stated below, that Claimant has demonstrated a change in his condition from the time of the prior denial, all evidence of record will be set forth below.

X-RAYS

Exhibit	Date of X-ray	Date of Reading	Physician / Credentials	Interpretation
DX 1	8/15/01	8/15/01	Hussain	1/1; p/s; 4 zones
DX 1	8/15/01	8/29/01	Sargent/ B[4], BCR[5]	Quality 3
DX 1	9/15/01	9/15/01	Dahhan/B	Completely negative
DX 13	6/07/04	6/07/04	Forehand/B	1/0; s/t; 3 zones
DX 14	6/07/04	7/05/04	Barrett/B, BCR	Quality 1
EX 1	6/07/04	8/10/04	West/B, BCR	0/0
DX 24	6/07/04	8/02/04	Kendall/B, BCR	Negative

PULMONARY FUNCTION TESTS

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results
DX 1 8/15/01	Good/ Good/ Yes	56/ 70”	3.91	5.15	78	76%	No
DX 1 9/15/01	Good/ Good/ Yes	56/ 68”	3.35	4.61	35.56	72%	No
DX 13 6/7/04	Good/ Good/ Yes	59/ 69”	3.58	4.91	---	72%	No

ARTERIAL BLOOD GAS STUDIES

Exhibit	Date	pCO_{2*}	pO_{2*}	Qualifying
DX 1	8/15/01	40.8 at rest 38.1 after exercise	75.0 at rest 76.0 after exercise	No No
DX 1	9/15/01	43.7 at rest 40.9 after exercise	74.6 at rest 75.5 after exercise	No No

[4] A “B” reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

[5] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

DX 13	6/7/04	35.0 at rest 34.0 after exercise	61.0 at rest 77.0 after exercise	Yes No

Narrative Reports

Dr. Imtiaz Hussain examined the Claimant on August 15, 2001. (DX 1). Based on symptomatology (daily productive cough, wheezing, dyspnea, and chest pain), a family medical history (high blood pressure, diabetes, cancer, asthma, and emphysema), an individual medical history (arthritis and hemorrhoid surgery), a smoking history (never smoked), physical examination (rhonchi), x-ray (1/1), PFT (moderate airways obstruction), and ABG (mild hypoxemia), Dr. Hussain diagnosed pneumoconiosis due to dust exposure and his x-ray finding. He found a moderate impairment due to pneumoconiosis but opined that Claimant retained the respiratory capacity to perform the work of a coal miner.

Dr. Abdulkadar Dahhan, who is board certified in internal medicine and pulmonary disease, examined the Claimant on September 17, 2001. (DX 1). Based on symptomatology (a daily cough with productive clear sputum, occasional wheeze, on an inhaler as needed, dyspnea on exertion, and sleeps on two pillows), an employment history (35 years of underground mining as a shuttle car and scoop operator and a mechanic), smoking history (non-smoker), individual medical history (hemorrhoidectomy), physical examination (good air entry to both lungs with no crepitation, rhonchi, or wheeze), chest x-ray (0/0), EKG (regular sinus rhythm), PFT (normal), and ABG (normal), Dr. Dahhan found no evidence of occupational pneumoconiosis or pulmonary disability secondary to coal dust exposure as demonstrated by the normal clinical examination of the chest, normal PFT, and ABG, and clear x-ray.

Dr. John Randolph Forehand examined the Claimant on June 7, 2004. (DX 13). Based on symptomatology (productive cough, wheezing, shortness of breath, chest pain, and 2-pillow orthopnea), an employment history (38 years with 28 being underground, most recently as a mechanic and shuttle car operator), smoking history (non-smoker), family history (cancer), individual medical history (colds, wheezing, arthritis), physical examination (crackles at the bases), chest x-ray (1/0), PFT (normal), and ABG (hypoxemia), Dr. Forehand diagnosed coal workers' pneumoconiosis based on history, physical examination, the x-ray, and the ABG. He found sufficient respiratory impairment to prevent Claimant from returning to his last coal mining job and opined that the Claimant is totally and permanently disabled. In his opinion, coal workers' pneumoconiosis is the sole factor contributing to the miner's respiratory impairment.

Dr. Forehand was deposed on August 30, 2004. (DX 20). He testified that he is a B-reader and board certified in pediatrics and allergy and immunology. Page five of the deposition is missing, but Dr. Forehand deposed that he saw linear or irregular opacities in the lower lung zones on the x-ray he viewed. He stated that about 20% of the time, changes are seen in the lower zones as irregular opacities. He testified that he found the miner to be totally disabled based on his finding of crackles, which he felt suggested "something evolving" in the lungs and later in his deposition as indicative of a fibrotic condition;" the x-ray; the blood gas study that showed hypoxemia; the symptom of shortness of breath; the lack of cardiovascular disease; and the miner's history of being a non-smoker. He felt that if the miner returned to work, his condition would be aggravated. Dr. Forehand testified that the exertional requirements of the

miner's usual coal mine job included lifting and carrying parts and tool boxes but he did not know how much weight Claimant was required to lift.

Dr. Bruce C. Broudy, who is board certified in internal medicine and pulmonary disease, reviewed the medical evidence in a report dated July 19, 2004. (EX 2). He considered Dr. Dahhan and Dr. Forehand's reports and associated underlying objective data. He concluded that Claimant does not have pneumoconiosis because "pneumoconiosis should be present on all films." He added that the Claimant did not demonstrate any ventilatory impairment and had only mild gas exchange impairment with a normal response to exercise. He found no evidence of any disabling respiratory impairment. Thus, he opined that Claimant retained the respiratory capacity to do his previous work or similarly arduous manual labor.

Smoking History

Claimant testified that he has never smoked, and this is consistent with all the medical reports. Accordingly, I find that Claimant is a life-long non-smoker.

DISCUSSION AND APPLICABLE LAW

This claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section; and

2. Has met the requirements for entitlement to benefits by establishing that he:

   (i) Has pneumoconiosis (see § 718.202), and

   (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

   (iii) Is totally disabled (see § 718.204(c)), and

   (iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Subsequent Claim

The provisions of § 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimants relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Compamy*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). The

amended version of § 725.309 dispensed with the material change in conditions language and implemented a new threshold standard for the claimant to meet before the record may be reviewed *de novo*. Section 725.309(d) provides that:

> If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part, the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see § 725.202(d) miner. . .) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> (1) Any evidence submitted in conjunction with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of the subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence establishes at least one applicable condition of entitlement. . . .
>
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue, shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

Section 725.309(d) (April 1, 2002).

Claimant's prior claim was denied after the District Director determined that Claimant failed to establish the existence of a totally disabling respiratory condition. Therefore, in order for Claimant to avoid having his subsequent claim denied on the basis of the prior denial, he must establish that he is totally disabled through newly submitted evidence.

Total Disability

Claimant may demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). The Board has held that under § 718.204(b), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

There is no evidence that Claimant has established that he suffers from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. There are two PFTs submitted in conjunction with this claim. Neither produced qualifying values. Therefore, I find that Claimant has failed to establish total disability pursuant to § 718.204(b)(2)(i).

Total disability can be demonstrated under § 718.204(b)(2)(ii) if the results of arterial blood gas studies meet the requirements listed in the tables found at Appendix C to Part 718. There are two ABGs submitted in this claim. The first, from September 2001, did not yield qualifying values. The more recent study of June 2004, however, produced qualifying values at rest but not after exercise. I find the 2004 study to be more probative of the miner's current state of health based on its recency. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Although the after-exercise portion of the study did not yield qualifying values, I find that the qualifying at-rest results tend to establish the existence of total disability under subsection (b)(2)(ii).

Total disability may also be shown under § 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment required him to bend, crawl, lift, and carry. (DX 5). He also had to "lift putting tires on shuttle cars, roof bolters, scoop, panel boards on shuttle cars." (DX 5).

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

Dr. Forehand opined that the miner does not have the respiratory capacity to perform the work of a coal miner. Dr. Dahhan found no disability caused by coal mine dust inhalation. Dr. Broudy opined that the miner did not demonstrate a disabling respiratory impairment.

Dr. Forehand's opinion is well documented and reasoned. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). It is supported by the at-rest blood gas study he administered, as well as the miner's symptoms and clinical presentation. The Forehand was aware that the miner's job required him to lift and carry parts and tool boxes. Claimant described his job as requiring bending, crawling, lifting, and carrying. (DX 5). He also had to "lift putting tires on shuttle cars, roof bolters, scoop, panel boards on shuttle cars." (DX 5). I find Dr. Forehand's knowledge of the miner's exertional requirements sufficient to render his opinion well reasoned. Accordingly, I place great weight on it.

Dr. Dahhan's opinion is well documented and reasoned and supported by the objective evidence he gathered. However, Dr. Dahhan's examination of the miner preceded Dr. Forehand's by almost three years. While Claimant's symptoms did not change, his physical presentation did. Dr. Dahhan noted good air entry with no crepitation, rhonchi, or wheeze, whereas Dr. Forehand found crackles at the bases of the lungs. I accord less weight to Dr. Dahhan's opinion because it likely contains a less accurate evaluation of the miner's current condition. *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985). Furthermore, because Dr. Dahhan's opinion encompasses both disability and its causation (the miner does not have "pulmonary disability secondary to coal dust exposure"), I do not consider his opinion to clearly rule out total disability.

Dr. Broudy's opinion is based on a review of Dr. Forehand's report and Dr. Dahhan's 2001 report. His conclusion that Claimant demonstrated only a mild gas exchange impairment that returned to normal after exercise does not appear to take into account the miner's physical presentation of crackles or his symptomatology. Accordingly, even though Dr. Broudy's credentials as a board-certified pulmonary specialist outweigh Dr. Forehand's, I place more weight on Dr. Forehand's opinion because of his first-hand examination of the miner and because Dr. Forehand's opinion does not dismiss Claimant's complaints and presentation. Thus, I find that the medical narrative evidence tends to support a finding of total pulmonary disability under § 718.204(b)(iv).

In weighing all the evidence for or against total disability under subsection (b)(i)(iv), I find the medical opinion evidence, when combined with the qualifying at-rest ABG, to be highly probative. Therefore, I find that Claimant has established, by a preponderance of the evidence, that he has a totally disabling pulmonary impairment. As a corollary, he has also demonstrated that one of the applicable conditions of entitlement has changed since the date of the last denial pursuant to § 725.309(d), and all of the evidence of record must now be considered to determine if he is entitled to benefits.

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Pneumoconiosis is defined by the regulations:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

Sections 718.201(a-c).

(1) Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis. Under § 718.202(a)(1), one method for finding that pneumoconiosis exists is the use of x-ray evidence.

In this claim the record contains five interpretations of three chest x-rays, and two quality-only interpretations. Dr. Hussain read the August 15, 2001 x-ray as positive for pneumoconiosis. He possesses no particular qualifications for x-ray interpretation, but the film was not reread except for quality purposes. Dr. Sargent, who is both a B-reader and a board-certified radiologist, found the x-ray to be quality 3. Based on the uncontradicted reading, I consider this x-ray positive for pneumoconiosis.

Dr. Dahhan interpreted the September 15, 2001 x-rays as completely negative. This film was not reread. Dr. Dahhan is a B-reader and he considered the film to be quality one. Based on his credentials and the uncontroverted evidence, I find this x-ray to be negative.

Dr. Barrett read the June 7, 2004 x-ray as a quality one film. Dr. Forehand found the x-ray to be positive for pneumoconiosis, while Dr. West and Dr. Kendall read the film as negative. Dr. Forehand is a B-reader, but Drs. West and Kendall are both B-readers and board-certified radiologists. Based on their credentials, Dr. West and Dr. Kendall's readings are entitled to greater weight. *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Therefore, I find that the evidence as to this x-ray is negative.

In summary, there are two positive and three negative readings. I find that the three negative readings outweigh the two positive readings based on the qualifications of the interpreters and the most recent evidence. *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984). Consequently, I find that the x-ray evidence does not establish the existence of pneumoconiosis pursuant to § 718.202(a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. That method is not available in the instant case because this record contains no biopsy evidence.

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; § 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in

> § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

This section requires a weighing of all relevant, medical evidence to ascertain whether or not Claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Drs. Hussain and Forehand diagnosed pneumoconiosis while Drs. Dahhan and Broudy did not. Dr. Hussain's opinion is based on his x-ray reading and the miner's coal mine employment history, which, I note, is nowhere set forth in Dr. Hussain's report. Less weight may be accorded a diagnosis of pneumoconiosis that is based only on an x-ray and coal mine employment history. *Cornett v. Benham Coal, Inc.* 227 F.3d 569 (6th Cir. 2000). Less weight may also be placed on the opinion of a physician who is unaware of the Claimant's coal mine employment history. *Crosson v. Director,* OWCP, 6 BLR 1-809 (1984). Consequently, I discount Dr. Hussain's opinion.

I place some weight on Dr. Dahhan's opinion because his negative x-ray reading is consonant with the later readings of dually certified interpreters. His report is well documented and well reasoned. However, I find the more recent evidence to be of greater probative value. Therefore, while I place some weight on Dr. Dahhan's opinion, I do not find it as persuasive as the two most recent opinions.

Dr. Forehand's opinion is based, in part, on the x-ray he read. That x-ray, however, was reread as negative by two dually certified interpreters. This alone, however, is insufficient to discount Dr. Forehand's opinion, for it is also based on his examination of Claimant and his consideration of the miner's symptomatology and physical presentation, as well as his history of exposure to coal mine dust. I find that Claimant's history as a non-smoker and his extensive exposure to coal mine dust, as well as the at-rest results of the ABG Dr. Forehand administered, provide a solid basis for Dr. Forehand's opinion. He also looked to other possible causes of the miner's problems, such as cardiovascular disease, but felt he could rule that out. I consider his opinion well documented and reasoned. In this case, I find that Dr. Forehand's opportunity to examine the miner in 2004 deserves special consideration. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440 (4th Cir. 1997). For these reasons, I place great weight on Dr. Forehand's opinion.

Dr. Broudy's opinion is well documented. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). However, Dr. Broudy stated that he did not diagnose pneumoconiosis because the disease "should be present on all films," and he found that only Dr. Forehand had found the disease by x-ray. However, Dr. Broudy did not review Dr. Hussain's report, and he too found

pneumoconiosis by radiograph. This additional evidence may have swayed Dr. Broudy's opinion. Still, Dr. Broudy's opinion is supported by the majority of x-ray readings, and he maintains superior qualifications in the field of pulmonary disease. *Scott v. Mason Coal Co.*, 14 BLR 1-38 (1990). Accordingly, I place some weight on his opinion but do not find it as persuasive as Dr. Forehand's.

After considering the conflicting conclusions, I find, for the reasons set forth above, that Dr. Forehand's opinion is the most persuasive. Therefore, I find that the evidence tends to establish the existence of pneumoconiosis under § 718.202(a)(4).

Upon consideration of all the evidence under § 718.202(a), I find the medical opinion evidence more persuasive than the x-ray evidence because it takes into account more than the results of one test. Consequently, I find that Claimant has established the existence of pneumoconiosis by a preponderance of the evidence pursuant to § 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000).

Arising out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must prove that pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). As I have found that Claimant has established at least 31 3/4 years of coal mine employment, he is entitled to the rebuttable presumption set forth in § 718.203(b)--that his pneumoconiosis arose out of coal mine employment. Therefore, since Employer has submitted no evidence to rebut the presumption, I find that Claimant has satisfied this element of entitlement.

Total Disability due to Pneumoconiosis

Claimant must also establish that his total disability is due to pneumoconiosis by a preponderance of the evidence. *Baumgartner v. Director, OWCP*, 9 BLR 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 BLR 1-4, 1-6 (1986) (en banc). In *Grundy Mining Co. v. Director, OWCP [Flynn]*, 353 F.3d 467 (6th Cir. 2003), the Sixth Circuit set forth the standard for establishing that a miner's total disability is due to pneumoconiosis:

> The claimant bears the burden of proving total disability due to pneumoconiosis and . . . this causal link must be more than *de minimus*. (Citation omitted). To satisfy the 'due to' requirement of the BLBA and its implementing regulations, a claimant must demonstrate by a preponderance of the evidence that pneumoconiosis is 'more than merely a speculative cause of his disability,' but instead 'is a contributing cause of some discernible consequence to his totally disabling respiratory impairment.' (Citation omitted). To the extent that the claimant relies on a physician's opinion to make this showing, such statements cannot be vague or conclusory, but instead must reflect reasoned medical judgment. (Citation omitted).

In connection with the prior claim, neither Dr. Hussain nor Dr. Dahhan found Claimant to be totally disabled. Dr. Hussain felt the miner retained the respiratory capacity to perform the work of a coal miner, and Dr. Dahhan found no pulmonary disability secondary to coal dust exposure. Of the newly submitted evidence, Dr. Forehand felt that pneumoconiosis is the sole factor contributing to the miner's total respiratory disability. Dr. Broudy found no impairment and did not address the issue of disability causation. In summary, only Dr. Dahhan and Dr. Forehand addressed disability causation and came to opposite conclusions.

Dr. Dahhan based his opinion on a normal clinical examination of the chest, a normal PFT, a normal ABG, and a clear x-ray. His reasoning was sound at the time he examined him in 2001. However, Dr. Forehand's 2004 examination revealed crackles in the lung bases, hypoxemia according to the ABG, and stage-one pneumoconiosis according to his x-ray reading. Dr. Forehand's opinion is further supported by the miner's exposure to coal mine dust that exceeded 31 years and the lack of a smoking history. Dr. Dahhan's opinion does not explain how the miner's many years of coal dust exposure had no influence on his respiratory ability. Furthermore, Dr. Dahhan's failure to find the existence of pneumoconiosis or any respiratory impairment detracts from the credibility of his opinion. *Scott v. Mason Coal Co.*, 289 F.3d 263 (4th Cir. 2002). He has not provided specific and persuasive reasons to allow me to conclude that his judgment does not rest upon his disagreement with my findings that Claimant suffers from pneumoconiosis and is totally disabled. Therefore, I discount his opinion.

Considering my finding that Claimant has coal workers' pneumoconiosis and that he has a totally disabling respiratory impairment, I find that the only justifiable conclusion that may be reached in this case is that Claimant's coal workers' pneumoconiosis did contribute substantially to his total respiratory disability. Because Dr. Forehand's opinion is the most persuasive on this issue, I find that Claimant has established, by a preponderance of the evidence, that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment.

Entitlement

Claimant has established a change in conditions sufficient to meet the statutory requirements of § 725.309(d). He has also established that he is totally disabled due to his pneumoconiosis. Therefore, I find that Claimant is entitled to benefits under the Act. While I find that he is entitled to benefits under the Act, I cannot determine the month of onset of Claimant's total disability due to pneumoconiosis. Thus, benefits are payable to Claimant beginning with the month in which he filed the current application for benefits. *See* § 725.503(b). Therefore, since Claimant filed his subsequent claim in March 2004, I find that benefits, augmented for two dependents, are payable beginning in that month.

Attorney's Fees

No award of attorney's fees for services to Claimant is made herein, since no application has been received from counsel. A period of 30 days is hereby allowed for Claimant's counsel to submit an application, with a service sheet showing that service has been made upon all parties, including Claimant. The parties have 10 days following receipt of any such application within

which to file their objections. The Act prohibits the charging of any fee in the absence of such approval. *See* §§ 725.365 and 725.366.

ORDER

IT IS ORDERED that the claim of E.R. for benefits under the Act is hereby GRANTED.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).